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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term 1985

No. 84-1523 (2)

RALPH T. DUFFY, JR.,

Petitioner,

vs.

CITY OF LONG BEACH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF CASE

Although the petition is couched in grandiloquent constitutional terms, the crux of this case is the petitioner's (Duffy's) prolonged maintenance of a public nuisance after adverse administrative hearings and a criminal conviction (after a nolo contendere plea) for that offense.

The gist of the City ordinance makes it a public nuisance to leave a building in a state of partial construction for an unreasonable period of time.

The public nuisance here was a partially constructed, exposed, unfinished, uninhabited and uninhabitable shell of a structure which was in that condition for nearly sixteen years in a well established residential area.

The structure was never occupied and never given final approval by the City and was euphemistically referred to by Duffy as my "home". After the decision of the Ninth Circuit, this nuisance was abated by the City by demolishing the structure.

Thus, the land per se is not involved in the case at bar -- only the perpetuation of a public nuisance thereon.

The issue here was the "existence"

of that vacant structure in violation of City ordinances, not the prohibited "use" or "taking" of property in a constitutional sense.

Duffy's petition is premised on the anachronistic notion that he can do whatever he wants with his property for as long as he wants, without governmental interference or without regard to his neighbors. As noted by the California Supreme Court in Agricultural Labor Relations Board v. Superior Court (1976) 16 Cal.3d 392, [128 Cal.Rptr. 183] at P.403:

> "It should scarcely be necessary, as we enter the last quarter of the 20th century, to reaffirm the principle that all private property is held subject to the power of the government to regulate its use for the public welfare."

Duffy wanted to build his own home but his dismal failure proves the truth of scriptural admonition recorded at Luke 14:28-30.

STATEMENT OF FACTS

The original building permit was issued to Duffy on June 28, 1968; because of lack of progress, the permit became void and was renewed ten times; the last renewal was on May 11, 1981, and that

permit expired on September 15, 1981. Pursuant to Section 18.12.100 of the Long Beach Municipal Code, this permit cannot be renewed again. The last known meaningful work on the structure occurred on December 10, 1979. To build any structure now, Duffy must obtain a new building permit and must submit new plans that comply with current code requirements.

In response to a citizen's complaint, the City issued Duffy a notice of violation on August 3, 1976, for maintaining a partially constructed building for an unreasonable period of time.

Due to lack of response, the matter was noticed for hearing before the City's Board of Examiners, Appeals and Condemnation. The Board held a hearing on November 8, 1976, with Duffy present and granted him six months to reroof and enclose the building along with reasonable landscaping.

Nearly two years later, due to noncompliance, the Board again noticed the matter for hearing. Duffy did not appear at the hearing. The Board declared the premises to be a public nuisance and ordered the owner to obtain the required permits, commence construction within ten days and complete the project with-

in sixty days. Duffy appealed this order to the Long Beach City Council and on October 10, 1978, the Council modified the Board's order and granted Duffy six months to complete the exterior and six additional months to complete the interior.

Due to noncompliance, the matter was referred to the City Prosecutor for initiation of criminal action and thereafter Duffy entered a plea of nolo contendere. Duffy was found guilty of violating probation on three occasions and probation was revoked after the third violation. Later, the Long Beach Municipal Court terminated probation on August 16, 1982.

The property continued to be maintained as a public nuisance so another hearing was noticed before the Board. After a hearing on October 18, 1982, with Duffy present, the Board again found a public nuisance and ordered completion or demolition of the structure by December 18, 1982. Duffy appealed to the City Council, and on December 7, 1982, the order was upheld by the Council.

On March 24, 1983, the City served Duffy its notice of intent to abate the nuisance.

After nearly fifteen years, Duffy's structure consisted merely of an open frame shell with a roof covering. The front was a "false" front, not part of the structure but only a temporary plywood covering. The wood frame shell was exposed to the elements for so long without adequate protective covering that most of it was deteriorated and unusable. The framework was never inspected or approved.

Since 1968, the Uniform Building Code as adopted by the City under State law, has been amended in 1970, 1973, 1976, 1979 and 1982. Duffy's original 1968 plans are outmoded and do not comply with these code changes.

On July 5, 1983, after this suit was filed in the district court, the City Council of the City of Long Beach held a duly noticed public hearing to determine whether the property located at 370 Flint Avenue, Long Beach, California was a public nuisance in violation of Section 8.76.010 A of the Long Beach Municipal Code. The Council found that the unfinished structure and premises at 370 Flint Avenue was a public nuisance and ordered the owner to either complete or demolish the structure by September 6,

1983; that if the owner failed to comply with the order, the City was ordered to demolish the structure.

ARGUMENT

I

THE LONG BEACH ORDINANCE IS A PROPER POLICE POWER MEASURE AND IS NOT VAGUE

The police power is reserved to the states by the 10th amendment to the United States Constitution. (Hamilton v. Kentucky Distilleries & W.Co. [1919] 251 U.S. 146, [64 L.Ed. 194 at 199].)

In California, this power is delegated to cities by Article XI, Section 7 of the State Constitution:

> "A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."

California Government Code Sections 38771 through 38773.5 provide that a City may declare by ordinance what constitutes a nuisance and provide for its summary abatement at the expense of the person who created or maintains the nuisance.

A city council may provide for the summary abatement, destruction or removal of unsafe structures and unsightly

or partially destroyed buildings (Govt. Code § 38610).

It is authorized to regulate the construction and removal of buildings (Govt. Code § 38601).

Section 3491 of the Civil Code sets out the remedies against a public nuisance.

> "The remedies against a public nuisance are:
> 1. Indictment or information;
> 2. A civil action; or
> 3. Abatement."

Section 3479 of the Civil Code defines nuisance as:

> "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

The applicable Long Beach ordinance, as amended in 1982, reads as follows:

> "Section 8.76.010 Nuisance Conditions
>
> "It is declared a public nuisance for any person owning, leasing, occupying or having charge or possession of any premises in this city to maintain such premises in

such manner that any of the following conditions are found to exist thereon:

"A. Buildings which are abandoned, boarded up, partially destroyed, or left for unreasonably long periods of time in a state of partial construction; provided that any unfinished building or structure which has been in the course of construction five years or more, and where the appearance and other conditions of said unfinished building or structure are such that the unfinished structure substantially detracts from the appearance of the immediate neighborhood or reduces the value of property in the immediate neighborhood or is a nuisance, shall be deemed and presumed to have been left for an unreasonably long period of time in the sense of this subsection."

When reviewing police power regulations, a reviewing court reviews and applies the law in effect at the time of its review. (Selby Realty Co. v. City of San Buenaventura [1973] 10 Cal.3d 110, 125-126, [109 Cal.Rptr. 799].)

This is a proper police power measure regulating structures on private property, and a structure which is only partially completed and vacant after a prolonged period is clearly substandard, an eyesore and detrimental to the welfare of adjacent property owners.

The broad scope of the police power

is outlined in the landmark case of Berman v. Parker (1954) 348 U.S. 26, [99 L.Ed. 27].

In Village of Belle Terre v. Boraas (1974) 416 U.S. 1, [39 L.Ed.2d 797], this court noted at page 416 U.S. 9:

> "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

More recently, Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, [69 L.Ed. 2d 800] held that preservation of the appearance of the city -- aesthetics -- was a legitimate governmental interest under the police power.

If noise and odors can be abated, there is no reason why that which offends the eyes can not be similarly abated as a public nuisance.

However, the subject City ordinance is concerned with more than "appearance" or the mere lapse of time. With the passage of time, open and exposed construction begins to deteriorate. An owner-builder, like a contractor, must obtain proper building permits with plans complying with the latest building regula-

tions. Since 1968, the Uniform Building Code, which is part of the Long Beach Building Regulations, has been amended in part in 1970, 1973, 1976, 1979 and 1982. Thus, a building in partial construction for a long period of time not only becomes deteriorated but the plans become obsolete. Duffy wanted to build a house in 1984 based upon 1968 plans and regulations. He has no vested right to do so.

Duffy's claim that the ordinance is vague is specious. He has been repeatedly told that the primary violation was his failure to complete the building within a reasonable time.

After entering a plea of nolo contendere in 1979, Duffy moved to terminate or modify his probation and belatedly raised the vagueness issue. In reviewing his vagueness argument, the Appellate Department of the Los Angeles Superior Court in People v. Duffy (1982) CRA 19410 stated:

> "In the matter before us, defendant's conduct plainly falls within the confines of the instant ordinance. Defendant is the owner of a building which does not yet have walls on all sides or working electricity. There is no exterior plastering, paint, window, or door

beyond the finished facade. Defendant's house can, without a doubt, be considered incomplete."

The question of vagueness cannot be viewed in a vacuum, and mathematical precision is not required. (Younger v. Smith [1973] 30 Cal.App.3d 138, 166, [106 Cal. Rptr. 225].)

As noted in Rose v. Locke (1975) 423 U.S. 48, [46 L.Ed.2d 185] at page 188:

> "All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden."

II

PETITIONER RECEIVED A DUE PROCESS HEARING

The Municipal Court terminated Duffy's probation on its own motion on August 16, 1982, even though the property was still in violation of the City ordinance.

Consequently, the City Council held another noticed hearing on December 7, 1982, again found Duffy's property in violation and ordered the abatement of the public nuisance.

On May 24, 1983, the district court granted a preliminary injunction against

the City to enjoin enforcement of the abatement order because the witnesses were not sworn at the hearing on December 7, 1982.

On July 5, 1983, the City Council of the City of Long Beach held a duly noticed public hearing to determine whether Duffy's property was a public nuisance in violation of Section 8.76.010 A of the Long Beach Municipal Code. The Council found that the unfinished structure and premises was a public nuisance and ordered the owner to either complete or demolish the structure by September 6, 1983; that if the owner failed to comply with the order, the City was ordered to demolish the structure.

The owner of the property and his attorney Bruce Stark were present at the hearing. Witnesses were duly sworn and opportunity for cross-examination of witnesses was provided.

Mr. Eugene Zeller, Superintendent of Building and Safety, reviewed the history of this nuisance abatement case after reading Long Beach Municipal Code Section 8.76.010 A into the record.

Mr. Bob Stump, Principal Building Inspector, offered pictures of the premises taken on June 29, 1983, and testi-

fied about its condition.

Mr. Dean Hart who lives directly across the street from Duffy's structure testified that it has been a fiasco for the last fifteen years; and that the structure was an eyesore and has adversely affected his property values.

Mr. Paul Barris who also lives across the street from the Duffy property testified about the unsightly structure and the decline in property values.

In summary, there can be little dispute that there was a public nuisance at 370 Flint Avenue, where the structure was in a state of partial construction for nearly sixteen years, and where the premises was an "eyesore" to the neighborhood and negatively affected property values.

Mr. Duffy was given the opportunity to testify under oath but chose not to do so. It would have been helpful if he had indicated how he would finance his construction and how long it would take him to finish.

Traylor v. City of Amarillo, Texas (5th Cir. 1974) 492 F.2d 1156, upheld a city exercising its police power to abate unrepaired nuisances, when it demolished private property without compen-

sation or prior judicial determination.

Hearings before local administrative bodies are informal; they are not trials and the strict rules of evidence do not apply. (Stoetzner v. City of Los Angeles [1959] 170 Cal.App.2d 394.)

In the case at bar, the basic due process requirements of "notice and opportunity for hearing appropriate to the nature of the case" were met. (Mullane v. Central Hanover B. & T. Co. [1949] 339 U.S. 306, 313, [94 L.Ed. 865].)

Duffy attacks the adequacy of the July 5, 1983, hearing by relying heavily on the case of Leppo v. City of Petaluma (1971) 20 Cal.App.3d 711, [97 Cal.Rptr. 840]. His reliance on Leppo is misplaced, because the vice there was that Petaluma, unlike Long Beach, did not have any hearing before the demolition order.

It is well established that a nuisance may be ordered abated by demolition of the offending structure if the nuisance cannot be otherwise abated. (Stoetzner v. City of Los Angeles [1959] 170 Cal.App.2d 394, 396.) As stated in City of Bakersfield v. Miller (1966) 64 Cal.2d 93, [48 Cal.Rptr. 889], at page 103:

> "In appropriate circumstances a governmental agency may abate a public nuisance even though to do so requires that a building be demolished."

In the case at bar, it was certainly appropriate to order the demolition of an unfinished and unused structure after nearly sixteen years.

III

THE FEDERAL COURT SHOULD ABSTAIN FROM REVIEWING FINDINGS OF PUBLIC NUISANCE MADE BY LOCAL AGENCIES

One aspect of the federal doctrine of abstention provides that abstention is appropriate where federal review of state law questions would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. (Burford v. Sun Oil Co. [1943] 319 U.S. 315, [87 L.Ed. 1424]; Trainor v. Hernandez [1977] 431 U.S. 434, [52 L.Ed.2d 486].)

Like land use decisions, local agencies and state courts have developed expertise in matters of public nuisance. Rarely does a federal court become involved in local public nuisance disputes. (Kent Island Joint Venture v. Smith [1978]

452 F.Supp. 455.)

In Parratt v. Taylor (1981) 451 U.S. 527, [68 L.Ed.2d 420] this court ruled that not every complaint alleging violation of Section 1983 under color of state law for deprivation of property without due process deserves to remain in federal court.

Parratt held that the existence of an adequate state remedy negates the conclusion that there was a constitutional deprivation of property. It quotes with approval from Bonner v. Coughlin (7th Cir. 1975) 517 F.2d 1311 the following at 451 U.S. 542:

> "We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment."

In the case at bar, Duffy had an adequate state remedy to review the decision of the City Council. California has a well established body of law under Code of Civil Procedure Section 1094.5 (administrative mandate) to judicially review the decisions of local administrative bodies. (Dunitz v. City of Los

Angeles [1959] 170 Cal.App.2d 399.)

Before filing his action in federal court, Duffy filed an action in state court attacking the constitutionality of the City ordinance and the public hearing of December 7, 1982.

On January 3, 1983, Duffy's ex parte application for a temporary restraining order was denied.

For some inexplicable reason, Duffy abandoned that action after the temporary restraining order was denied ex parte. Ordinarily, the denial of a TRO is only the beginning of a lawsuit, not the end.

Duffy did not even serve the complaint on the City. Instead, he forum-shopped and filed this action in the federal court.

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CONCLUSION

The petitioner does not raise a substantial or important federal question or show a deprivation of federally protected rights. He merely raises a question of fact concerning the existence of a nuisance. He has had his day in court (both civil and criminal) on this issue. For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 12, 1985

Respectfully submitted,

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